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No. 96-5658

In The

Supreme Court of the United States

October Term, 1996

CARY MICHAEL LAMBRIX,

Petitioner,

vs.

HARRY SINGLETARY, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the doctrine of *Teague v. Lane* bars relief based upon *Espinosa v. Florida* in habeas corpus proceedings?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CITATION TO OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Proceedings in the Trial Court 2

B. Proceedings on Direct Appeal 5

C. Post-Appeal Proceedings 6

SUMMARY OF THE ARGUMENT 8

ARGUMENT 10

I. THE CONSTITUTIONAL INFIRMITY OF THE INSTRUCTION ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS DICTATED BY *GODFREY V. GEORGIA* AND ITS PROGENY 10

II. THE INVALID HAC AGGRAVATING CIRCUMSTANCE STILL INFECTS THE SENTENCE, AND THE INVALIDITY OF THE SENTENCE WAS DICTATED BY 1986 LAW 11

A. The Jury Considered the Invalid HAC Aggravating Circumstance, and the Trial Judge Gave Great Weight to the Jury's Tainted Recommendation 11

TABLE OF CONTENTS – Continued

Page

B. The Error Before the Jury Was Compounded Because the Trial Judge Not Only Gave Great Weight to the Jury's Recommendation, but also Found the HAC Aggravating Circumstance, Without Applying Any Limiting Construction 13

C. The *Godfrey* Error Continues to Infect the Sentencing Process Because No Court Has Ever Conducted Constitutionally Proper Reweighing or Harmless Error Review 15

D. *Glock v. Singletary* Is Not Pertinent Because in *Glock* the Jury Error Was Not Compounded by Judge Error, and *Glock* Was Wrongly Decided 20

1. *Glock* Does Not Apply to the Instant Case 20

2. The *Glock* Court Misapplied *Clemons v. Mississippi* to the Florida Sentencing Procedure 21

III. THE CONSTITUTIONAL INFIRMITY OF THE JURY INSTRUCTION ON THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR WAS DICTATED BY EXISTING PRECEDENT FOR THE SAME REASONS THAT APPLY TO THE HAC AGGRAVATING CIRCUMSTANCE 30

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES:

Andres v. United States, 333 U.S. 740 (1948) 12

Baldwin v. Alabama, 472 U.S. 372 (1985) 16

Barclay v. Florida, 463 U.S. 939 (1983) 18, 26

Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989), *cert. denied*, 497 U.S. 1032 (1990) 28, 29

Butler v. McKellar, 494 U.S. 407 (1990) 10

Caldwell v. Mississippi, 472 U.S. 320 (1985) 28

Caspari v. Bohlen, 510 U.S. 383 (1994) 6

Clemons v. Mississippi, 494 U.S. 738 (1990) ... 17, 21, 22, 29

Coley v. State, 204 S.E.2d 612 (Ga. 1974) 15

Cooper v. State, 336 So. 2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977) 27

Eddings v. Oklahoma, 455 U.S. 104 (1982) 20

Elledge v. State, 346 So. 2d 998 (Fla. 1977) 27

Espinosa v. Florida, 505 U.S. 1079 (1992) ..... *passim*

Floyd v. State, 497 So. 2d 1211 (Fla. 1986) 24

Garcia v. State, 492 So. 2d 360 (Fla.), *cert. denied*, 479 U.S. 1022 (1986) 12

Glock v. Singletary, 65 F.3d 878 (11th Cir. 1995) (en banc), *cert. denied*, 117 S. Ct. 225 (1996) ..... *passim*

Godfrey v. Georgia, 446 U.S. 420 (1980) ..... *passim*

Gregg v. Georgia, 428 U.S. 153 (1976) 14, 15

Hallman v. State, 560 So. 2d 223 (Fla. 1990) 27

TABLE OF AUTHORITIES – Continued

Page

Hitchcock v. Dugger, 481 U.S. 393 (1987) 25

Jackson v. State, 648 So. 2d 85 (Fla. 1994) 32, 34

Lambrix v. Dugger, Case No. 88-12107-Civ-Zloch (S.D. Fla., May 12, 1992) 7

Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994) 7

Lambrix v. Singletary, 72 F.3d 1500 (11th Cir. 1996) ..... *passim*

Lambrix v. State, 494 So. 2d 1143 (Fla. 1986) 4, 5, 19

Lambrix v. State, 534 So. 2d 1151 (Fla. 1988) 6

LeDuc v. State, 365 So. 2d 149 (Fla. 1978), *cert. denied*, 444 U.S. 885 (1979) 4, 12

Lockett v. Ohio, 438 U.S. 586 (1978) 12, 24

Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1071 (1989) 22, 28, 29

Maynard v. Cartwright, 486 U.S. 356 (1988) ..... *passim*

Messer v. State, 330 So. 2d 137 (Fla. 1976) 24

Miller v. State, 332 So. 2d 65 (Fla. 1976) 24

Mills v. Maryland, 486 U.S. 367 (1988) 11

Parker v. Dugger, 498 U.S. 308 (1991) 20

Peek v. State, 395 So. 2d 492 (Fla. 1980), *cert. denied*, 451 U.S. 964 (1981) 26

Proffitt v. Florida, 428 U.S. 242 (1976) 14, 16

Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987) 24, 25

Smalley v. State, 546 So. 2d 720 (Fla. 1989) 28, 29

TABLE OF AUTHORITIES – Continued

Page

Smith v. State, 515 So. 2d 182 (Fla. 1987), *cert. denied*, 485 U.S. 971 (1988) 12, 19

Sochor v. Florida, 504 U.S. 527 (1992) 26

State v. Dixon, 283 So. 2d 1 (1973), *cert. denied sub nom. Hunter v. Florida*, 416 U.S. 943 (1974) .. 3, 14, 27

Stringer v. Black, 503 U.S. 222 (1992) ..... *passim*

Teague v. Lane, 489 U.S. 288 (1989) ..... *passim*

Tedder v. State, 322 So.2d 908 (Fla. 1975) 4, 12, 23

STATUTES:

28 U.S.C. § 1254(l) 1

Sup. Ct. R. 20.1, 20.4, 468 U.S. 1253 (1984) 6

Fla. Stat. § 921.141 (1983) 2, 4, 26

Florida Rule of Criminal Procedure 3.850 ..... 6, 7

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in this case, rendered on January 3, 1996, is reported at *Lambrix v. Singletary*, 72 F.3d 1500 (11th Cir. 1996), and is reprinted in the Joint Appendix at J.A. 157.

JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. § 1254(1). The judgment and opinion of the Eleventh Circuit was rendered on January 3, 1996. Petitioner filed a timely petition for certiorari, which this Court granted on November 1, 1996.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions:

a. The Eighth Amendment to the United States Constitution, which provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

b. The Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

This case also involves Fla. Stat. § 921.141 (1983), which sets forth Florida's capital sentencing scheme as of the time of Petitioner's trial. Because the provisions of the statute are lengthy, their text is set out in the Appendix to this Brief.

STATEMENT OF THE CASE

A. Proceedings in the Trial Court

On February 24, 1984, Petitioner was convicted of two counts of first degree murder.[1] A sentencing hearing was then held before the jury. Evidence in aggravation and mitigation was presented.[2] The prosecutor argued that a death

[1] Mr. Lambrix and his girlfriend had met a couple by chance in a bar and gone back to Mr. Lambrix's trailer with them after a night of drinking. Mr. Lambrix went outside with each member of the other couple. The first time he came back, there was no sign that anything was amiss. When he came back the second time he told his girlfriend that they were both dead. The man died of blows to his head from a tire iron, the first of which probably rendered him unconscious. There was no physical evidence of the cause of death of the woman, but it was assumed to be manual strangulation. Mr. Lambrix and his girlfriend buried the bodies and fled the area in the man's car.

[2] The prosecution presented evidence in aggravation that at the time of the murders Mr. Lambrix was absent without leave from a work release facility where he was serving a sentence for passing a bad check (his only prior felony). R. 2583. The defense presented evidence in mitigation that Mr. Lambrix's mother abandoned him and his siblings when he was a young boy. R. 2601-02, 2610. Thereafter, he had no contact with his mother. Nevertheless, he was a quiet, gentle and helpful boy. He was nonviolent and frequently backed away from physical confrontations. R. 2592-93, 2602, 2609-11, 2617. Although he had

sentence should be predicated on the statutory aggravating factor that the crime was "especially heinous, atrocious or cruel." R. 2649. The jurors were instructed that the HAC aggravating factor applied if the "crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." J.A. 9, R. 2663.[3] The prosecutor also argued that a death sentence should be predicated on the aggravating factor that the crime was "cold, calculated and premeditated." The jurors were instructed that the CCP factor applied if the "crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." J.A. 9, R. 2663.[4] The jurors recommended that the trial court sentence Petitioner to death, although four jurors

to drop out of school, he worked hard from an early age to support himself and his family. Later on, he obtained his GED and attended bible school. R. 2602, 2604. As an adult, he served in the Army, from which he was honorably discharged after suffering head and back injuries in a fall. Family members testified that his personality changed after the head injury, and after that injury he got into trouble on the bad check charge. R. 2593, 2605-06, 2618.

[3] Relying on *Godfrey v. Georgia*, 446 U.S. 420 (1980), and *State v. Dixon*, 283 So. 2d 1 (1973), *cert. denied sub nom. Hunter v. Florida*, 416 U.S. 943 (1974), defense counsel had proposed several instructions informing the jury that they could only find the factor if the "capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies – the conscienceless or pitiless crime which is unnecessarily torturous to the victim." J.A. 4-8, R. 1342-44, 1346, quoting *Dixon*, 283 So. 2d at 9, and citing *Godfrey*. These requested instructions were denied. R. 2630, 2632-33.

[4] Trial counsel had challenged the vagueness of this aggravating factor by pretrial motions, R. 22, 24, 87-89, which the trial court denied.

voted for life with respect to the male victim, and two with respect to the female victim.[5]

Under Florida law, the trial judge was required to consider the jurors' recommendation and to give it "great weight." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). *See also LeDuc v. State*, 365 So. 2d 149, 151 (Fla. 1978), *cert. denied*, 444 U.S. 885 (1979) (jury recommendation of death "should not be disturbed . . . unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation."). He instructed the jury that he would give their recommendation great weight. J.A. 16-17, R. 2670-71. "In accordance with the jury's recommendation, the trial judge imposed two sentences of death . . . , finding five aggravating and no mitigating circumstances with regard to [one] . . . murder . . . and four aggravating and no mitigating circumstances in regard to the [other] murder. . . . " *Lambrix v. State*, 494 So. 2d 1143, 1145 (Fla. 1986). He found the HAC aggravating circumstance and the CCP aggravating circumstance in connection with both murders.[6]

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[5] The jury is not required to specify its findings with respect either to aggravating or mitigating circumstances, but simply recommends a sentence of either life or death. Fla. Stat. § 921.141(2) (1983).

[6] The court found the aggravating factors of under sentence of imprisonment (based on Mr. Lambrix's absence from work release); prior conviction of a capital felony, based on the two murders (although the State waived reliance on it before the jury, R. 2645); committed for pecuniary gain, based on the theft of the car (with respect to the male victim only); heinous, atrocious or cruel; and cold, calculated and premeditated. J.A. 19-20, R. 1354-55. With respect to the HAC aggravating factor, the court's only finding was: "The facts speak for themselves." J.A. 20, R. 1355.

B. Proceedings on Direct Appeal

Mr. Lambrix appealed to the Florida Supreme Court, which upheld both convictions and sentences. No issues as to the propriety of the death sentences were briefed or argued on direct appeal. The court summarily reviewed the findings of the trial court concerning the aggravating circumstances, noting that appellant had not contested on appeal the trial judge's findings as to aggravating and mitigating circumstances. *Lambrix v. State*, 494 So. 2d 1143, 1148 (Fla. 1986). After enumerating the aggravating circumstances found by the trial court – including the two findings of HAC and the two findings of CCP – the Florida Supreme Court concluded that there was sufficient evidence to support all of those aggravating circumstances. *Id.* The only finding explained or detailed by the Supreme Court was that the pecuniary gain aggravating circumstance was supported by the theft of one victim's car after the murder. *Id.*[7]

Counsel did not file for rehearing and did not file a petition for writ of certiorari to this Court. Pursuant to this Court's rules on finality for purpose of analysis under *Teague v. Lane*, 489 U.S. 288 (1989), Mr. Lambrix's conviction and sentence became final on November 24,

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[7] In the evidentiary hearing held in the federal habeas proceedings, former Florida Supreme Court Justice Alan Sundberg testified that in his opinion competent appellate counsel would have raised issues concerning the applicability of the HAC, CCP and pecuniary gain aggravating circumstances on direct appeal. 11th Cir. R11-22-29.

1986. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (conviction becomes final when "the time for filing a petition for certiorari has elapsed or a timely filed petition has been finally denied."); Sup. Ct. R. 20.1, .4, 468 U.S. 1253 (1984) (at time of Mr. Lambrix's direct appeal, parties in criminal cases were required to file certiorari petition within sixty days of date of denial of appeal by state court of last resort).

C. Post-Appeal Proceedings

Mr. Lambrix filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. In the motion, he raised two claims alleging that the jury received unconstitutionally vague instructions regarding the HAC and CCP aggravating factors. The trial court summarily denied all of Mr. Lambrix's claims on the merits.

Mr. Lambrix appealed the denial of the Rule 3.850 motion to the Florida Supreme Court and filed an emergency motion to stay execution in the Florida Supreme Court, attaching the Rule 3.850 motion and supplement. On November 30, 1988, the Florida Supreme Court denied all relief, indicating that Mr. Lambrix had raised only two issues on appeal of the 3.850 denial. *Lambrix v. State*, 534 So. 2d 1151 (Fla. 1988).

Mr. Lambrix then filed a federal petition for writ of habeas corpus in district court. The district court stayed his execution pending review. In August 1991, the district court allowed Mr. Lambrix a hearing on specific issues, including his ineffective assistance of counsel claims. On May 12, 1992, the district court denied the petition, ruling

on the merits of all claims. *Lambrix v. Dugger*, Case No. 88-12107-Civ-Zloch (S.D. Fla., May 12, 1992), J.A. 66. The district court specifically rejected the State's contention that Mr. Lambrix had waived any claims on the appeal of the denial of his Rule 3.850 motion, concluding that the Florida Supreme Court did not find a waiver of any claims, and that had it done so it would not have been following a consistently or regularly applied state procedural rule. *Id.* at 11-14, J.A. 76-79. The district court's finding that there was no procedural bar was undisturbed on appeal.

The district court denied a certificate of probable cause to appeal, but a certificate was granted by the Eleventh Circuit. While the appeal was pending, this Court issued its decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992). The State, through Respondent's counsel, the Attorney General of Florida, requested that the state courts be given the opportunity "to address the substance of Lambrix's claims as significantly transformed by *Espinosa*." *Lambrix v. Singletary*, 72 F.3d 1500, 1503 (11th Cir. 1996). The Eleventh Circuit stayed the appeal "to permit Lambrix to present his *Espinosa* claims to the Florida state courts." *Id.* The Florida Supreme Court subsequently denied Mr. Lambrix's state habeas corpus petition, in which he raised, *inter alia*, claims concerning the vagueness of the instructions on the statutory aggravating circumstances. *Lambrix v. Singletary*, 641 So. 2d 847 (Fla. 1994).

The case then returned to the Eleventh Circuit. While the case was awaiting a decision after briefing and oral argument, the Eleventh Circuit issued its decision in *Glock v. Singletary*, 65 F.3d 878 (11th Cir. 1995) (en banc),

cert. denied, 117 S. Ct. 225 (1996). Noting that Glock's trial judge had rejected the HAC aggravating circumstance, *id.* at 881, the court analyzed the claim as alleging that a jury instruction defining HAC in the manner held unconstitutional by *Espinosa* invalidated Glock's death sentence "despite his trial judge's proper reweighing of aggravating and mitigating circumstances. . . . " *Id.* at 882-83. The court described *Espinosa* as holding that a trial judge's "constitutionally sound reweighing of aggravating and mitigating circumstances does not cure the jury's consideration of an unconstitutionally vague aggravator," *id.* at 884, and found that this was a new rule for *Teague* purposes – i.e., a rule that was not dictated by precedent existing at the time Glock's conviction became final in 1986. *Id.* at 889. After the *Glock* decision was issued, an Eleventh Circuit panel denied all of Mr. Lambrix's claims on the merits, saying that his *Espinosa* claims were *Teague*-barred by the en banc ruling in *Glock*. *Lambrix v. Singletary*, 72 F.3d 1500 (11th Cir. 1996).

SUMMARY OF THE ARGUMENT

Petitioner's jury was instructed on the HAC aggravating circumstance in terms identical to those in *Espinosa*. In the wake of *Espinosa*, no one has denied that these instructions were unconstitutionally vague. No one has argued that Petitioner's substantive claim that they are unconstitutional is *Teague*-barred. Thus far, the case is easy. (See Part I, *infra*.).[8]

[8] The CCP instruction given to Petitioner's jury is subject to the same constitutional deficiency. See Part III *infra*.

The decision below denying Petitioner relief upon his substantive *Espinosa* claims stands upon a supposed ancillary or *procedural* ruling attributed to *Espinosa* by the intervening en banc majority opinion in *Glock*. This supposed procedural ruling was that "a sentencing judge's proper reweighing does not cure the constitutional error" of jury instructions which permit a recommendation of death to be based upon an unconstitutionally vague definition of HAC. *Lambrix*, 72 F.3d at 1503. Such a ruling, *Glock* held, was a "new rule" as of the date of *Espinosa*; and Petitioner's panel in turn believed that the "new rule" holding in *Glock* required it to *Teague*-bar Petitioner's otherwise valid substantive constitutional claims.

All of these elaborate complications, however, are beside the point in Petitioner's case. By applying *Glock* to the present record the panel below extended *Glock* into square, unsalvageable conflict with a controlling decision of this Court – *Stringer v. Black*, 503 U.S. 222 (1992) – which has already resolved every *Teague* issue, substantive or procedural, that could conceivably stand between Petitioner and relief. We discuss the relevant aspects of the record in Parts II.A and II.B *infra;* and we show in Part II.C why, on this record, *Stringer* is completely controlling. Once again, as Parts II.A through II.C will demonstrate, Petitioner's own case remains a very easy one.

Alternatively, the Court may wish to use this case to deal with *Glock* more basically. *Glock* was not only wrongly extended to the circumstances of the present record but was also wrong in its central reasoning. *Glock* disregards the Florida Supreme Court's settled reading of Florida law; *Glock* distorts *Espinosa*'s reading of settled federal constitutional doctrine; *Glock* thus creates *Teague*

problems where no *Teague* problems exist. These interwoven subjects require lengthier discussion than the rest of the case if the Court chooses to reach them; we address them in Part II.D.2 *infra*.

ARGUMENT

I. THE CONSTITUTIONAL INFIRMITY OF THE INSTRUCTION ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS DICTATED BY *GODFREY V. GEORGIA* AND ITS PROGENY

In *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam), this Court recited two rules. The first was that a jury instruction submitting Florida's HAC aggravating circumstance with no limiting definition or explanation was unconstitutionally vague under Eighth Amendment precedents going back to *Godfrey v. Georgia*, 446 U.S. 420 (1980). *Espinosa*, 505 U.S. at 1081. The second was that because Florida has split its sentencing process by requiring that the sentencing court give great weight to the jury's sentencing recommendation, a *Godfrey* error in instructing the jury taints the trial court's weighing process. *Id.* at 1082. Neither of those rules was "new," under *Teague v. Lane*, 489 U.S. 288 (1989), because both existed or were dictated by precedent existing when Mr. Lambrix's judgment became final in November, 1986. *Butler v. McKellar*, 494 U.S. 407 (1990).

There is no question that the first rule – that an unrestricted HAC instruction (such as was given to the

jury in the instant case, J.A. 9, R. 2663) is unconstitutionally vague – was dictated by existing precedent. In *Stringer v. Black*, 503 U.S. 222 (1992), this Court held that application of *Godfrey v. Georgia*, 446 U.S. 420 (1980), to such a HAC instruction is not a new rule. *Stringer*, 503 U.S. at 228-29. That holding applies directly to *Espinosa*. As this Court noted in *Espinosa*, "[w]e have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague." *Espinosa*, 505 U.S. at 1081. Applying *Godfrey* to Florida's HAC jury instruction did not "break new ground" and did not announce a new rule.

II. THE INVALID HAC AGGRAVATING CIRCUMSTANCE STILL INFECTS THE SENTENCE, AND THE INVALIDITY OF THE SENTENCE WAS DICTATED BY 1986 LAW

A. The Jury Considered the Invalid HAC Aggravating Circumstance, and the Trial Judge Gave Great Weight to the Jury's Tainted Recommendation

As set forth above, the jury that recommended that Petitioner die considered an aggravating circumstance – "especially heinous, atrocious or cruel" – that was invalidated by *Godfrey* error. Although the jury made no findings concerning the aggravating circumstance, it must be presumed that the jury found and weighed it, because the instructions allowed them to do so without proper guidance and without narrowing the class of persons eligible for the death sentence. *Espinosa*, 505 U.S. at 1082; *Mills v. Maryland*, 486 U.S. 367, 376-77 (1988) (must presume that

jury rested sentence on improper ground if instructions permitted it to do so); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (prohibiting procedure that creates unacceptable risk that death will be imposed in spite of factors which may call for a less severe penalty); *Andres v. United States*, 333 U.S. 740, 752 (1948) (doubt concerning effect of instruction in death penalty case must be resolved in favor of accused).

As this Court recognized in *Espinosa*, 505 U.S. at 1082, the trial court was required to give great weight to the jury's tainted recommendation. In Florida, the jury's sentencing "recommendation" is of crucial importance. If the jury recommends life, then the trial judge can override that recommendation only when "the facts [are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). By the same token, under Florida law the judge had to give great weight in his or her own weighing process to the jury's tainted recommendation of death. *See LeDuc v. State*, 365 So. 2d 149, 151 (Fla. 1978), *cert. denied*, 444 U.S. 885 (1979) (jury recommendation of death should not be disturbed "unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation," citing *Tedder*); *Garcia v. State*, 492 So. 2d 360, 367 (Fla.), *cert. denied*, 479 U.S. 1022 (1986) (trial court properly instructed jury that it would give their recommendation great weight); *Smith v. State*, 515 So. 2d 182 (Fla. 1987), *cert. denied*, 485 U.S. 971 (1988) (jury recommendation of death entitled to great weight). Indeed, the trial judge here instructed the jurors he would give great weight to their recommendation. J.A. 16-17, R. 2670-71.

Therefore, this Court's recognition in its summary, per curiam decision in *Espinosa*, that by requiring the trial court to give great weight to the jury's recommendation the court did not cure jury error but rather indirectly weighed it, *Espinosa*, 505 U.S. at 1082, was nothing more that a straightforward application of existing precedent to the Florida sentencing scheme. It must be presumed that the trial judge here followed Florida law and his own instructions and gave great weight to the jury's recommendation, *id.*, and nothing that he said or found is to the contrary.

B. The Error Before the Jury Was Compounded Because the Trial Judge Not Only Gave Great Weight to the Jury's Recommendation, but also Found the HAC Aggravating Circumstance, Without Applying Any Limiting Construction

As demonstrated above, the trial judge gave great weight to the jury's recommendation of death, which was tainted by *Godfrey* error. The trial judge also himself found and weighed the HAC aggravating circumstance. In finding the HAC aggravating circumstance, the trial court's only finding was, "[t]he facts speak for themselves." J.A. 20, R. 1355. Thus, the record shows that the trial court, which had not limited the jury's discretion to find the HAC circumstance, was similarly unrestricted in its own discretion to find the circumstance.[9] A mere

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[9] In addition to instructing the jurors that they must find HAC if the State proved that the murder was "especially wicked, evil, atrocious or cruel," J.A. 9, R. 2663, the court later instructed them that they "may be justified" in finding HAC if

statement on review that the facts support the aggravating circumstance does nothing to "cure the constitutional infirmity of the aggravating circumstance." *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 428-32 (1980) (failure to limit jury's discretion was not cured on appellate review where appellate court simply stated that the offense was "outrageously or wantonly vile, horrible and inhuman").

Thus, the effect of the jury instruction error was actually compounded by the trial court's consideration of the HAC aggravating circumstance. In effect, the trial judge inappropriately weighed the HAC aggravating circumstance twice – once by giving great weight to the jury's tainted recommendation of death, and then again by finding and weighing the aggravating circumstance himself without applying any constitutional limiting construction to the aggravating circumstance.

Espinosa reaffirms the rule that the sentencer may not consider aggravating factors that fail to guide the sentencer's discretion. That rule was announced by this Court in *Gregg v. Georgia*, 428 U.S. 153 (1976), where the

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the State proved that the death "was caused by one or more of numerous wounds to the decedent." J.A. 14, R. 2668. Like the definitional instruction, this permissive one failed to limit the jury's discretion and indicates no recognition of any limitations on the judge's discretion. The permissive instruction not only sets no boundaries on the scope of the aggravator but affirmatively indicates that the sentencer can find HAC in circumstances where the *Dixon* limiting construction (approved by this Court in *Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976)) – that the murder must be "unnecessarily torturous" to the victim – does not apply.

Court approved Georgia's capital sentencing scheme only because it controlled the jury's sentencing discretion by "'clear and objective standards.'" *Id.* at 198 (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974)). It was reiterated in *Godfrey*, where the Court condemned the fact that in that case the jury's discretion had not been controlled, leading to the "standardless and unchanneled imposition" of the death sentence. *Godfrey*, 446 U.S. at 429. *Espinosa* merely recognizes the fact that under Florida law the sentencing authority is split between the judge and jury; therefore, neither may be "permitted to weigh invalid aggravating circumstances." *Espinosa*, 505 U.S. at 1082.

That unsurprising principle was dictated by *Gregg* and *Godfrey*. Here, it was violated three times: 1) the jury weighed the invalid HAC aggravating circumstance; 2) the trial judge indirectly weighed the invalid HAC aggravating circumstance by giving great weight to the jury's tainted recommendation; 3) the trial judge also weighed the HAC aggravating circumstance without applying a limiting construction. Under these circumstances, relief is dictated by *Gregg*, *Godfrey* and their progeny.

C. The *Godfrey* Error Continues to Infect the Sentencing Process Because No Court Has Ever Conducted Constitutionally Proper Reweighing or Harmless Error Review

It is clear now and it was clear in 1986 that *Godfrey* error invalidates a death sentence unless it is cured by constitutionally appropriate review. This Court held as

much in *Godfrey* itself, when it ruled that the "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury was in no way cured," *Godfrey*, 446 U.S. at 429, by the Georgia Supreme Court's review of the sentence. But this Court has never intimated that deferential review could cure *Godfrey* error. Instead, the kinds of review that could cure such error are strictly limited.

A successor court could cure error if under state law it simply gave no weight whatever to the jury's tainted verdict, as was the case at one time in Alabama, where the jury returned a "sentence" of death along with its guilty verdict but the sentencing court independently imposed sentence "without regard to the jury's mandatory 'sentence.'" *Baldwin v. Alabama*, 472 U.S. 372, 383 (1985). In *Baldwin*, however, the Court distinguished a procedure like Florida's, where the trial court is "required to consider the jury's 'sentence' as a recommendation as to the sentence the jury believed would be appropriate" and where the court is "obligated to accord some deference" to the jury's recommendation. *Id.* at 382. *Baldwin* cited *Proffitt v. Florida*, 428 U.S. 242 (1976), for its understanding of Florida law; and indeed it had been clear for a decade before 1986 that the Florida sentencing judge is required to accord deference to the jury's recommendation, and therefore that the sentencing authority is split between the two rather than placed solely in the judge's hands in a way that would quarantine the judge from the infection of error in the jury proceedings.

Alternatively, a successor court could cure the sentencing process of *Godfrey* error by conducting either constitutionally appropriate harmless error analysis or

reweighing. *Clemons v. Mississippi*, 494 U.S. 738 (1990). Through this process, the successor court would become free of the error by cutting away the invalid aggravating factor and either reweighing the aggravation and mitigation for itself or determining beyond a reasonable doubt how the jury would have weighed aggravation and mitigation in the absence of the tainted factor; or by applying a limiting definition and either reweighing or determining beyond a reasonable doubt whether the jury would have found the factor under that definition. *Id.* at 751-53. Whether reweighing or reviewing the error to determine harmlessness, the successor court owes no deference to the earlier decision that was infected with error. Clearly, though, a Florida trial judge does not proceed in this manner, but, to the contrary, gives great weight to the jury's determination in the judge's own weighing process, thereby incorporating the error that took place before the jury.

This Court's decision in *Stringer v. Black*, 503 U.S. 222 (1992), compels the conclusion that nothing that took place in the instant case cured the *Godfrey* error under 1986 federal constitutional standards. *Stringer* held specifically that relief on a very similar claim to that presented here was dictated by existing precedent as of February 19, 1985, the date when Stringer's conviction became final. *Id.* at 226. In *Stringer*, the issue was whether *Clemons* announced a new rule. The State argued that prior to *Clemons* it was acceptable for an appellate court in a weighing state to affirm a death sentence that was tainted by invalid aggravating factors without further review if there were other, valid aggravating factors that could have supported the death sentence. *Id.* at 232. This Court rejected that argument: "[W]e have not suggested that the

Eighth Amendment permits the state appellate court in a weighing State to affirm a death sentence without a thorough analysis of the role an invalid aggravating factor played in the sentencing process." *Id.* at 230. Instead, there is a "specfic requirement that a sentence based on an improper factor be reassessed with care to assure that proper consideration was given. . . . " *Stringer,* 503 U.S. at 231. *See also id.* (noting that these principles were illustrated by the decision in *Barclay v. Florida,* 463 U.S. 939 (1983), where the Court affirmed the sentence, despite the fact that the trial court had weighed an invalid aggravating factor, "but only because it was clear that the Florida Supreme Court had determined that the sentence would have been the same had the sentencing judge given no weight to the invalid factor," citing *Barclay,* 463 U.S. at 958 (opinion of Rehnquist, J.); *id.* at 973-74 (opinion of Stevens, J.)).

This rule was flouted in Mr. Lambrix's case. The trial judge here did not "reassess" the jury's sentencing recommendation "with care" to correct the *Godfrey* error – or even with a recognition that *Godfrey* error existed and required correction. After the jury's tainted recommendation was issued, there was no point at which *any* court gave "thorough analysis" or "close . . . scrutiny" or "proper consideration" to the effect of the invalid HAC aggravating factor on the sentencing process. The trial court did not reweigh the sentence without consideration of those aggravating factors; instead it relied on both of them, but without itself applying any limiting construction. The trial court also incorporated and relied upon the

jury's recommendation of death.[10] Therefore, the trial court did nothing that remotely could have cured the error that took place before the jury.

Similarly, there is nothing in the Florida Supreme Court's opinion on direct appeal to indicate that it took any action to cure the effect of the jury error or to give "close . . . scrutiny" to the effect of the invalid aggravating factors. The court noted that the trial court had imposed the death sentence "[i]n accordance with the jury's recommendation. . . . " *Lambrix v. State,* 494 So. 2d 1143, 1145 (Fla. 1986). Without giving any consideration to the effect of the invalid HAC and CCP aggravating factors on the jury's recommendation, and without stating any standard for review, the court simply noted that it "agree[d] with the trial judge and all of the parties involved," *id.* at 1148, concerning the applicability of the aggravating circumstances found by the trial court. At the time of the Florida Supreme Court's review of the death sentence, it was the law of the land that "a sentence based on an improper factor be reassessed with care to assure that proper consideration was given. . . . " *Stringer,* 503 U.S. at 231. There is no indication, much less clarity,[11] that any such reassessment took place.

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[10] Under Florida law, the court was *required* to give great weight to the jury's death recommendation. *Smith v. State,* 515 So. 2d 182, 185 (Fla. 1987), *cert. denied,* 485 U.S. 971 (1988); *see supra* at p. 12. It must be presumed that the judge followed Florida law, *Espinosa,* 505 U.S. at 1082, and his own instructions to the jury.

[11] The rule for which *Stringer* cited *Barclay,* that a death sentence could not be upheld on a record containing federal constitutional error unless it was "clear" that judicial action had been taken to correct the error, has been a settled Eighth

On these facts, it was undebatable at the time Mr. Lambrix's conviction became final *both* that the instructions given to his jury on the HAC aggravating circumstance were unconstitutionally vague *and* that this unconstitutionality continued to infect the sentencing process because it went uncorrected thereafter. Accordingly, on this record, both the substantive rule recognized in *Espinosa* and the relief that Mr. Lambrix seeks under it were compelled by precedent that was in existence at the time Mr. Lambrix's conviction became final. Such relief is plainly not barred by *Teague v. Lane*, 489 U.S. 288 (1989).

D. *Glock v. Singletary* Is Not Pertinent Because in *Glock*, the Jury Error Was Not Compounded by Judge Error, and *Glock* Was Wrongly Decided

1. *Glock* Does Not Apply to the Instant Case

In *Glock v. Singletary*, 65 F.3d 878 (11th Cir. 1995) (en banc), *cert. denied*, 117 S. Ct. 225 (1996), the Eleventh Circuit relied on the fact that the trial court had not found the HAC aggravating factor. The *Glock* court thought this was significant because in its view it was a new rule to apply *Godfrey* to a case where the trial court had "reweigh[ed] aggravators and mitigators without taking into account the unconstitutionally vague aggravating circumstance." *Id.*

In the instant case, however, the trial judge actually weighed the unconstitutionally vague HAC aggravating

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Amendment rule since at least *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *See, e.g., Parker v. Dugger*, 498 U.S. 308, 319-20 (1991).

circumstance, and did so without applying any constitutional limiting construction. Accordingly, the rule that the *Glock* court thought was new does not even apply. The rule that does apply is the longstanding rule that the sentencer may not rely on aggravating circumstances that fail to channel the sentencer's discretion. Here, there was *Godfrey* error before both jury and judge. In such a case, there is no question that relief is compelled by *Godfrey*.

2. The *Glock* Court Misapplied *Clemons v. Mississippi* to the Florida Sentencing Procedure

In *Glock*, the en banc court thought that it was reasonable to conclude prior to *Espinosa* that a successor court could cure error that took place before the jury while at the same time deferring to the jury's tainted decision. The very concept that a court could cure error while deferring to the error-infected decision is novel and paradoxical. It also cannot be squared either with this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990), or with the Florida sentencing procedure.

The *Glock* court understood *Espinosa* as holding that a trial judge's "*reweighing* of aggravating and mitigating circumstances does not cure the jury's consideration of an unconstitutionally vague aggravator."[12] *Glock*, 65 F.3d at 884. However, the analogy thus posited between a Florida trial judge's imposition of sentence – all the while deferring to the jury's recommendation – and the kind of appellate reweighing approved by this Court in *Clemons*

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[12] All emphasis is supplied unless otherwise indicated.

is misleading. Nothing that this Court said in *Clemons* suggested that it would have approved appellate reweighing if the court conducting such reweighing had to defer to the tainted sentencing verdict. To the contrary, this Court's entire discussion emphasized that to conduct valid reweighing, an appellate court cannot simply assume that the invalid aggravation would have made no difference, but must determine the proper sentence independent of the error. *See Clemons v. Mississippi*, 494 U.S. at 751-52 (application of automatic affirmance rule, affirming sentence infected by invalid aggravation because sentence was supported by one or more valid aggravating circumstances, would not be valid reweighing).[13] Indeed, deferential review of a sentence that resulted from a weighing process infected with error would run directly afoul of the "well-settled principle" that "use of a vague

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[13] In a footnote, the *Glock* court suggested that in *Clemons* this Court did approve deferential appellate reweighing. *Glock*, 65 F.3d at 883 n.5. The court cited *Clemons*, 494 U.S. at 744-47, but nothing in these pages from *Clemons* approves *deferential* reweighing. The court also cited *Mann v. Dugger*, 844 F.2d 1446, 1448 (11th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1071 (1989), for the proposition that the Mississippi Supreme Court defers to the jury's sentence. But in *Mann*, the court was discussing the Mississippi Supreme Court's ordinary review of a death sentence in a case where there is no error, not its reviewing or reweighing after determining that there *was* error before the jury. Nothing in *Clemons*, let alone *Stringer*, suggests that this Court would ever have allowed an appellate court to determine that there was *Godfrey* error before the jury, but still give great weight to the jury's sentence in its appellate review. The entire notion of "deferential reweighing" makes no sense, and Petitioner is unaware of any court other than *Glock* that has even suggested such a notion.

or imprecise aggravating factor in the weighing process invalidates the sentence. . . . " *Stringer*, 503 U.S. at 237. Because the jury's tainted sentence is *invalid*, the appellate court can no longer rely on it or defer to it; consistent with the Eighth Amendment, the sentence can be affirmed only if the appellate court *independently* reweighs the evidence or concludes that the error was harmless.

The *Glock* court's analysis simply fails to recognize the basic facts about Florida's sentencing procedure that this Court described in *Espinosa*. How the Florida penalty phase jury is instructed concerning aggravating circumstances matters because whether the jury recommends life or death matters. What the jury recommends matters because of how the Florida sentencing procedure works – the trial court gives " 'great weight' " to the jury's recommendation, whether of life or of death, and the result of the jury's weighing process "is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances." *Espinosa*, 505 U.S. at 1082, (quoting *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975)). Because the trial court must defer to the jury's weighing the trial court cannot conduct the kind of independent review or *re*weighing necessary to cure *Godfrey* error.

There was nothing novel about that recognition. The significance of the Florida jury's sentencing decision – and the tainting effect of error before the jury, regardless of the trial court's deferential weighing – were well recognized by the Florida courts, by this Court and by the Eleventh Circuit long before *Espinosa* was decided. The Florida Supreme Court has routinely treated error that occurs before the jury as requiring a new sentencing

proceeding before a new jury, even when the trial judge claims not to have been affected by the error. *See, e.g., Floyd v. State,* 497 So. 2d 1211 (Fla. 1986) (*Lockett* error required resentencing even though judge found no mitigation, statutory or nonstatutory, was established by evidence); *Messer v. State,* 330 So. 2d 137 (Fla. 1976) (vacating sentence where jury recommended death after trial court prevented it from hearing certain mitigating evidence, even though trial court thereafter considered and weighed the evidence excluded from the jury); *Miller v. State,* 332 So. 2d 65, 67-68 (Fla. 1976) (same). The court reached a similar result in *Riley v. Wainwright,* 517 So. 2d 656 (Fla. 1987). There, the trial court committed error under *Lockett v. Ohio,* 438 U.S. 586 (1978), by failing to instruct the jury that it could consider nonstatutory mitigation. In a resentencing proceeding before the judge only (necessitated by the fact that the judge had weighed nonstatutory aggravating factors) the judge expressly stated that he had considered all of the mitigating evidence presented. Nevertheless, the court held that the *Lockett* error required holding a new sentencing proceeding before a properly instructed jury:

> This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process.
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> This Court also has recognized that the jury's determination of the existence of any mitigating circumstances, statutory or nonstatutory, as well as the weight to be given them are essential components of the sentencing process.

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> . . . . We reject the state's argument that a new advisory jury upon resentencing is not constitutionally required under Florida's sentencing scheme. If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, *then the entire sentencing process is necessarily tainted by that procedure.*

Riley, 517 So. 2d at 657-59 (citations omitted).

The conclusion reached by the Florida Supreme Court in *Riley* was implicitly endorsed by this Court in *Hitchcock v. Dugger,* 481 U.S. 393 (1987). In *Hitchcock,* a unanimous Court held that failure to give a Florida sentencing jury an adequate instruction allowing it to consider nonstatutory mitigating circumstances violated the Eighth Amendment. It was so obvious to this Court and to all the parties that a Florida sentencing jury must receive constitutionally adequate instructions that nobody even raised the issue and this Court did not address it. That would make no sense if the instructional error could have been cured by the trial court's weighing of nonstatutory mitigation.

If there is any significant difference between instructional error with respect to mitigating circumstances and instructional error with respect to aggravating circumstances, error with respect to aggravating circumstances is more prejudicial. The error at issue in *Riley* and *Hitchcock* may have prevented the jurors from finding and weighing nonstatutory mitigation. If they had weighed such evidence, it could have tipped the scales, resulting in a binding jury recommendation of life. By the same

token, instructional error with respect to aggravating circumstances may result in the jury finding and weighing circumstances that, if properly instructed, it would have rejected – thereby taking weight off of death's side of the scales and resulting in a binding recommendation of life. But in addition the invalid aggravation may also be crucial to the jury's initial decision that the defendant is even eligible for death. If the aggravation is not sufficiently weighty to justify the death sentence, the sentencer does not even reach the point of balancing aggravation and mitigation. Fla. Stat. §921.141(2)(a), (3)(a) (1983); *see Barclay v. Florida*, 463 U.S. 939, 954 n.12 (1983).[14]

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[14] Although the jury did not make findings concerning aggravating circumstances, it is quite possible that the tainted aggravation in Mr. Lambrix's case was crucial to the jury's decision that the aggravation was sufficient to impose death. The jury was instructed to consider five aggravating factors. Of these five, the court found no facts to support the robbery murder aggravating factor. Presumably, the jury also rejected it. *See Sochor v. Florida*, 504 U.S. 527, 538 (1992) (presuming jury did not find aggravating factor that was unsupported by the evidence). The pecuniary gain aggravating factor was supported only by the taking of the victim's car after the fact. In similar circumstances, the Florida Supreme Court has rejected the aggravating circumstance, *see, e.g., Peek v. State*, 395 So. 2d 492 (Fla. 1980), *cert. denied*, 451 U.S. 964 (1981) (circumstance does not apply where car taken to facilitate escape, not as motive for murder), and the jury may have done so as well. If so, that left only the tainted HAC and CCP aggravating factors and the factor of under sentence of imprisonment, based on the fact that Mr. Lambrix had walked away from work release on a bad check charge. While this circumstance was unquestionably present, the jury was instructed that it could only recommend death if it found "sufficient aggravating factors exist to justify the imposition of the death penalty." J.A. 8, R. 2662. Thus, it is entirely possible that in the absence of the tainted HAC and CCP aggravating factors, the jury would not even have found Mr. Lambrix eligible for the death penalty, *see Hallman v. State*, 560 So. 2d 223, 227 (1990) (jury life recommendation supported by weakness of the aggravating factors), and so would not even have reached the stage of weighing aggravating against mitigating circumstances.

Therefore, to the extent that the differences between aggravating and mitigating circumstances are significant, they suggest that the rule that instructional error with respect to aggravating circumstances taints the entire sentencing process follows, *a fortiori*, from the application of the same rule with respect to mitigating circumstances. Indeed, the Florida Supreme Court itself has applied the same rule to error with respect to aggravating circumstances. *See, e.g., Elledge v. State*, 346 So. 2d 998 (Fla. 1977) (resentencing before jury required where jury considered nonstatutory aggravating circumstances); *Cooper v. State*, 336 So. 2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977) (proper instruction defining HAC must "[o]f course" be given to jury; trial court gave proper instruction under *State v. Dixon*, 283 So. 2d 1 (1973)).

Thus, the Florida Supreme Court has at all times viewed its sentencing scheme as one in which the jury plays a critical role and therefore one in which it is necessary to give the jury proper instructions on how to weigh aggravating and mitigating circumstances – including proper definitions of aggravating circumstances. "It would be a strange view of federalism that ignores the view of the highest court of a State as to the meaning of its own law," *Stringer v. Black*, 503 U.S. at 235, but that was the view of the *Glock* court.

The Eleventh Circuit has also recognized that the Florida jury plays a crucial role in the sentencing process, and therefore that error that occurs before the jury taints the entire process. In *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) (en banc), the petitioner claimed that comments and instructions to the jury gave the jury the false impression that its role in the process was unimportant, in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The court undertook a thorough survey of Florida law with respect to the role and significance of the sentencing jury. *Mann v. Dugger*, 844 F.2d at 1450-54. Based on those cases, the *Mann* court, like this Court in *Espinosa*, concluded that "the Florida jury plays an important role in the Florida capital sentencing scheme," functioning as a capital sentencer, and therefore that denigration of the jury's role creates *Caldwell* error that requires resentencing because the jury's recommendation is then "tainted by an impermissible bias in favor of death." *Id.* at 1454-55 and n.10.[15]

The *Glock* court found two cases that were contrary to this long series of cases recognizing that constitutional error before the jury taints the Florida sentencing process. In *Smalley v. State*, 546 So. 2d 720 (Fla. 1989), and *Bertolotti v. Dugger*, 883 F.2d 1503 (11th Cir. 1989), *cert. denied*, 497 U.S. 1032 (1990), the Florida Supreme Court and the

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[15] Curiously, although the *Glock* court purported to have undertaken a thorough survey of Florida and Eleventh Circuit law with respect to the significance of the jury's role, it omitted mention of its earlier en banc decision in *Mann*, aside from misapplying the *Mann* court's discussion of *Mississippi* sentencing law and appellate review. *See Glock*, 65 F.3d at 883 n.5.

Eleventh Circuit respectively rejected post-*Maynard v. Cartwright*, 486 U.S. 356 (1988), challenges to death sentences based on invalid HAC jury instructions, on the ground that any jury error was cured by the trial court's weighing of the aggravating circumstances. In neither case did the court discuss the substantial body of law – summarized above and in *Mann* – pointing in exactly the opposite direction.

The *Smalley* and *Bertolotti* decisions were simply unreasonable, for reasons very similar to those for which this Court found prior Fifth Circuit decisions unreasonable in *Stringer*. As this Court concluded in *Stringer*:

> The Fifth Circuit ignored the Mississippi Supreme Court's own characterization of its law and accorded no significance to the fact that in Mississippi aggravating factors are central in the weighing phase of a capital sentencing proceeding. As we have explained, when these facts are accorded their proper significance, the precedents even before *Maynard* and *Clemons* yield a well-settled principle: use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system.

Stringer, 503 U.S. at 237. In *Bertolotti* and *Smalley*, the Eleventh Circuit and the Florida Supreme Court ignored the Florida Supreme Court's own characterization of its law and accorded no significance to the fact that in Florida the weighing process is split between the judge and jury and the jury's weighing process affects that of the judge. When those facts are accorded their proper significance, the precedents before *Maynard*, *Clemons* and

Espinosa yield a well-settled principle: Allowing the jury to include an unconstitutionally vague aggravating factor in its weighing process invalidates the jury's recommendation and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system *by a court that owes no deference to the jury's tainted weighing process.*

No reweighing of that kind took place in Mr. Lambrix's case. The trial court did not and could not, consistent with Florida law, "reweigh" the aggravating and mitigating circumstances free from the influence of the jury's recommendation of death. Application of well settled precedent to the existing Florida law required relief well before *Espinosa* was decided. Therefore, *Espinosa* did not announce a new rule and *Teague v. Lane*, 489 U.S. 288 (1989), does not bar the relief sought by Mr. Lambrix.

III. THE CONSTITUTIONAL INFIRMITY OF THE JURY INSTRUCTION ON THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR WAS DICTATED BY EXISTING PRECEDENT FOR THE SAME REASONS THAT APPLY TO THE HAC AGGRAVATING CIRCUMSTANCE

The Eleventh Circuit denied relief on Mr. Lambrix's claim that the jury instruction on the "cold, calculated and premeditated" aggravating factor was unconstitutionally vague on the same ground that it denied relief on the similar claim with respect to the vagueness of the HAC instruction. *Lambrix v. Singletary*, 72 F.3d 1500, 1503 (11th Cir. 1996). With respect to the role played by the Florida penalty phase jury in the sentencing process, the

two claims are obviously identical. And for the same reasons that apply to the HAC aggravating circumstance, the conclusion that the jury instruction on the CCP aggravating factor was unduly vague was dictated by existing precedent in 1986.

Mr. Lambrix's jury was instructed to weigh the CCP factor if they found that the "crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." J.A. 9, R. 2663. That instruction was unconstitutionally vague for the same reasons as the HAC instruction condemned by this Court in *Espinosa*. The penalty phase jury in most cases has already been instructed that it can find the defendant guilty of first degree murder if the State proves premeditation beyond a reasonable doubt.[16] An ordinary person instructed to determine whether the crime was "cold, calculated and premeditated" could reasonably conclude that the verdict of guilt necessarily required a finding of the CCP aggravating factor.

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[16] In most Florida cases, the jury is given a general instruction at guilt phase that it can find the defendant guilty of first degree murder based either on premeditated murder or if the homicide took place during the commission of one of several enumerated felonies. The only instance where a Florida jury would not receive an instruction on premeditated murder at guilt phase would be a case where the State proceeded solely on a felony murder theory. That was not the case here. In fact, the State did not pursue felony murder and the jury was instructed only on premeditated murder. R. 2533. Therefore, the jury's verdict that Mr. Lambrix was guilty of first degree murder necessarily incorporated a finding that he was guilty of premeditated murder.

That is precisely the kind of vagueness condemned well before Mr. Lambrix's trial by this Court in *Godfrey*, where the Court found Georgia's "outrageously or wantonly vile, horrible and inhuman" aggravating factor unduly vague because an ordinary person "could fairly characterize almost every murder" in that fashion. *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980). *See also Maynard v. Cartwright*, 486 U.S. 356, 364 (1988) (HAC aggravating factor unduly vague because "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.' ").

Accordingly, the vagueness of the CCP jury instruction was established by precedent in existence well before Mr. Lambrix's trial. This conclusion is further supported by the Supreme Court of Florida's decision in *Jackson v. State*, 648 So. 2d 85 (Fla. 1994). In *Jackson*, the court considered this very issue. The court ruled that the conclusion that the instruction was unduly vague was compelled by *Godfrey* and *Maynard*:

> Florida's standard CCP jury instruction suffers the same constitutional infirmity as the HAC-type instructions which the United States Supreme Court found lacking in *Espinosa*, *Maynard*, and *Godfrey* – the description of the CCP aggravator is "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." *Espinosa*, ___ U.S. at ___, 112 S. Ct. at 2928.

Jackson, 648 So. 2d at 90.

The court reasoned that this was so because in the absence of additional guidance concerning the CCP factor, the average juror may think the aggravating factor is

present in every case of premeditated murder. Where that is true, *Godfrey* and *Maynard* compel the conclusion that the aggravating factor is unduly vague:

> The premeditated component of Florida's standard CCP instruction poses the same problem [as in *Godfrey* and *Maynard*]. Where a defendant is convicted of premeditated first-degree murder, the jury has already been instructed that:
>
> > "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> Fla.Std.Jury Instr. (Crim.) 63. *Without the benefit of an explanation that some "heightened" form of premeditation is required to find CCP, a jury may automatically characterize every premeditated murder as involving the CCP aggravator.*
>
> *It would also be reasonable for the general public to consider premeditated first-degree murder as "cold-blooded murder."* Without legal guidance that the coldness element is only present when the killing involves "calm and cool reflection," or when the murder is "more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder," *the average juror may automatically characterize all premeditated murders as CCP.*

Id. at 89 (citations omitted). As the reasoning of the Florida Supreme Court in *Jackson* shows, the conclusion that the CCP instruction failed to limit the jury's discretion was dictated by existing precedent in 1986.

CONCLUSION

The holding of *Espinosa* was dictated by *Godfrey* and *Maynard*, as appears from the face of the opinion itself. Indeed, this Court considered what it was doing so unremarkable that it issued its decision per curiam, without briefing or oral argument. It was unlikely that this Court would break new ground in a per curiam opinion, and it did not do so. This Court should reverse and remand to the Eleventh Circuit for consideration of the merits of Mr. Lambrix's claim that the instructions on the CCP and HAC aggravating circumstances violated his Eighth Amendment rights.

Respectfully Submitted,

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APPENDIX

WEST'S FLORIDA STATUTES ANNOTATED
TITLE XLVII. CRIMINAL PROCEDURE AND CORRECTIONS
CHAPTER 921. SENTENCE

921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.

Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its

admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.

After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.

Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) Review of judgment and sentence.

The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.

Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances.

Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.